

What a Gender-Just Uniform Civil Code Could Look Like

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In the wake of the Law Commission of India's [call for views on the Uniform Civil Code \(UCC\)](#) from the public at large, advocacy in favour of the UCC has centred on three distinct premises:

- a) a bashing of Muslim family law, and by extension, the Muslim community as regressive, conservative, orthodox, patriarchal and resistant to change;
- b) a projection of Hindu family law as progressive, inclusive, and gender-just, which must be emulated and extended to all communities in India; and
- c) the UCC as an imperative for national integration and women's equal rights in family law.

The Law Commission, in its [Consultation Paper of 2018](#), had debunked all three premises.

It highlighted positive aspects of Muslim law such as the concept of *mehr* and a one-third limit for willing away property, which ensures that some property is available to the legal heirs, including daughters and other women, by succession. The Law Commission also elaborately discussed the discriminatory aspects that continue to [irk Hindu family law](#), and even called for the abolition of Hindu Undivided Family and the Hindu coparcenary with its right by birth in ancestral property.

The Law Commission categorically stated that secularism cannot be contradictory to pluralism and that national integration cannot be advanced through the UCC when “cultural difference informs people's identity, and its preservation guarantees the territorial

integrity of the nation.”

It prioritised gender equality *within* each religious community, rather than *between* communities, as discrimination, not difference, lies at the roots of inequality.

Given the constitutional protection and autonomy given to tribal communities in Sixth Schedule states, it also found it necessary to preserve their distinct family law systems and introduce gender-just reforms from within rather than from above.

Keeping key principles such as equality, non-discrimination, personal autonomy and agency, inclusivity, fairness and secularism at the centrality of a potential UCC, here are some aspects that a gender-just UCC could ensure.

Gender inclusivity and diversity in marriage

All family laws speak in gender binaries – man, woman, husband, wife, bridegroom, bride and so on. Those who identify themselves beyond these binaries, within the spectrum of trans and queer identities, are excluded from the pale of current family laws. They are deprived of a legal recognition of marriage and protection of their matrimonial rights, should they choose to be governed by such laws.

In a landmark judgment in 2019, the Madurai bench of the Madras high court directed the marriage registrar to register a marriage between a cis man and a transwoman, concluding that the term ‘bride’ in the Hindu Marriage Act connotes not only cis women but also trans women. Judgments such as in the *Naz Foundation* and *Navtej Singh Johar* cases have foregrounded the importance of self-determination of gender identity.

The bundle of petitions asking for same sex marriages to be recognised in family laws of India have had their final hearings in the Supreme Court and are awaiting judgment.

In May this year, the Supreme Court of Nepal directed the government to register same sex marriages. India could take inspiration from its neighbour.

Broader definition of family

According to family laws in India, a ‘family’ consists of a couple and their minor or dependent children, towards whom they have responsibilities. In cases of a married woman, her husband’s parents are recognised as her family.

However, a heteronormative, monogamous family is a colonial concept that is highly incongruent with the varied forms of family and kinship that have traditionally and are currently in existence in India. These include *maitri karaar* in Gujarat, *nata* in Rajasthan, *sambandham* in Kerala, *kareva* or *chaddar andazi* in Haryana, *dhuku* in Jharkhand, *Hijra gharanas*, live-in relationships, chosen families and polyamory.

Thus ‘family’ needs to be broadened in tandem with ground realities.

Age of marriage

The statutory age of marriage maybe set at 18 (on par with the age criteria for voting, and the recognised age of majority). The moot point is the consequence of violation of the age criteria. Given that a few years ago, it was reported that 84% of 12 million married children under 10 are Hindus, if all underaged marriages are declared void or legally invalid, such a move will have adverse consequences for all children and their rights within such marriages, particularly from the Hindu community.

Conversely, the concept of 'option of puberty' – originating from Muslim law and now incorporated in other laws – provides agency to the underaged party to the marriage to refuse to accept the marriage upon becoming a major.

Agency in marriage and live-in relationships

Inter-religious, inter-caste, inter-class and same sex relationships are not only frowned upon and disapproved by the natal family; in many instances, there is collusion between the family, community leaders and vigilante groups, leading to “honour” crimes.

The law must recognise the agency and decisional autonomy of parties to marriage who have attained majority, without the need for any parental permission. The judiciary, through judgments in the cases of Arumugam Servai, Lata Singh, Shafin Jahan and Shakti Vahini, has reiterated the same.

Live-in relationships have been recognised by the Protection of Women from Domestic Violence Act (PWDVA), 2005. Partners deciding to live together without the stamp of the law is a democratic exercise that state ought not to intervene with, using the ruse of Shraddha Walkar and Nikki Yadav cases.

Status of children

There ought to be no differences in rights attributed to children born within a marriage or prolonged live-in relationships (considered legitimate), children born through transient relationships (considered illegitimate), adopted and surrogate children.

Children born in inter-caste, inter-religious or inter-class marriages should suffer no discrimination, in law or in reality.

As suggested by the Law Commission in 2018, all children must be considered legitimate and entitled to inherit property from their parents.

Guardianship and adoption

Where both parents are alive, they must both be given equal status as natural guardians, unlike the Hindu Minority and Guardianship Act, 1956, that recognises the father as the natural guardian, and after him, the mother. All parties must have an equal right to adoption. The right of single persons and persons in same sex relationships to adopt a child must be recognised, in tandem with the submission of the Delhi Commission for Protection of Child Rights to the Supreme Court. This is because parenting depends on the capacity to and quality of care, not the gender or sexual orientation of the caregiver.

Responsibilities towards parents

All children – biological, adopted and surrogate – irrespective of their gender – must have equal responsibilities towards ensuring the physical, financial and emotional well-being of parents, recognised in law.

Grounds of divorce

Fault grounds of divorce such as cruelty, desertion and adultery, as well as a divorce by mutual consent ought to be equally available to all parties to the marriage. In May 2023, the Supreme Court stated that it had the discretion to terminate a marriage that had broken down irretrievably, under Article 142(1) of the Indian constitution to do 'complete justice' to the parties. However, such a ground must be invoked with caution, after the issue of matrimonial property is settled and the wife's economic interests secured.

Maintenance and alimony

Even though women must be encouraged to remain financially independent during the subsistence of marriage and upon its divorce, maintenance and alimony must be provided to the financially vulnerable party to the marriage or its dissolution.

Women's unpaid housework and care work should be attributed a financial value and must be incorporated into the ascertainment of quantum of maintenance and alimony.

Abolition of restitution of conjugal rights (RCR)

The RCR is a matrimonial remedy that compels parties to marriage to live together, in recognition of the aggrieved party's conjugal rights. This remedy, of colonial origin, was incorporated into Hindu Marriage Act and found its way into family laws governing varied communities, though it was abolished in England in 1970. Though superficially, it applies equally to the parties to marriage, it has disproportionate and adverse consequences for women who may be at the receiving end of violence, raped and unwanted pregnancies.

As stated by Andhra Pradesh high court in T.Sareetha, the woman is stripped of bodily control and autonomy through a court order of RCR. A petition challenging the constitutional validity of this remedy remains pending before the Supreme Court, but the government, in its wisdom, ought to exclude this provision in any proposed UCC, as it is inconsistent with the constitutionally guaranteed fundamental right to life with dignity.

Recognition of concept of matrimonial property

Upon the divorce or death of a party to marriage, an equitable distribution of assets acquired by parties during the subsistence of the marriage, is of prime importance. Such property maybe in the name of the earning party to the marriage, but the theory of social reproduction tells us that the contribution of non-earning party to the home facilitates such an acquisition.

No family law squarely addresses this issue, except in Goa, where too, the rights on paper are at variance with lived experiences of women. If the government is committed to gender equality within the family, it must make provisions for a matrimonial property regime.

Transfer of property by a will

In many northern and western societies, daughters are routinely compelled to sign away their ancestral property rights in favour of their brothers, through relinquishment deeds (referred to as 'haq tyaag' in Punjab, Haryana and Rajasthan). Such patriarchal social norms neutralise and defeat legal provisions of equal property rights to daughters.

Taking a leaf from Muslim law, which prescribes that not more than one-third of the property can be willed away, the Law Commission, in 2018, recommended that all family laws prescribe a portion that must be kept aside for dependants of the deceased person, and that the entire property cannot be willed away. The Commission also noted that persons with disabilities, especially women, are denied right to inheritance directly (excluded from wills) or indirectly (not given their share of property), which must be countered by law.

Distribution of property when there is no will

The scheme of intestate succession (when a person owns property and dies without making a valid will) is vastly different under each family law. As suggested by the LCI in 2018, based on the rule of proximity (nearness) in relation to the deceased, the scheme could be classified as follows:

Class 1 – spouse, children, children of pre-deceased children and parents of the deceased.

Class 2 – siblings, children of siblings (if the sibling is not alive) and grandparents.

Class 3 – other relatives.

All surviving Class 1 heirs would take the property entirely among them with one share each; the property would devolve on Class 2 heirs only if no Class 1 heir exists. And on Class 3 if no Class 2 heirs are alive. This scheme should be gender neutral, and treat biological, adopted and surrogate children on par, and make no distinction between legitimate and illegitimate children.

The above list is not exhaustive, but indicative.

If we are to believe that the government has finally woken up from its slumber (just in time for the 2024 general elections), and is now determined to enact a UCC, we are in a position to decide on supporting it only when we know its contents.

While it is not easy to believe in the *bona fides* of a government that ignored the Law Commission's call for gender-just reforms in family laws for five long years (2018-2023), a wish list of what a gender-just UCC could consist of has the potential to concretise and ground the discussions on UCC.

We have the responsibility to analyse the Uttarakhand UCC Bill that has just been announced (on June 30, 2023), and determine what course corrections are required for a national one, if at all.

Dr. Saumya Uma is a Professor at Jindal Global Law School, O.P. Jindal Global University, and heads its Centre for Women's Rights. She teaches, writes and speaks at the intersections of gender, human rights and the law. The opinions expressed in this article are her own.

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